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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JAMES A. BARNARD,

Petitioner,

v.

JACKSON COUNTY, MISSOURI, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public employee be discharged for allegedly violating a confidentiality rule where he speaks with members of the press on matters of inherent public concern which have already been fully disclosed in newspaper accounts?

2. In conducting the balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), may the court of appeals engage in fact finding in order to resolve the legal question whether Petitioner's interest in free speech was outweighed by the interests of the respondents as his governmental employers?

LIST OF PARTIES

The parties to the proceedings below are Petitioner James A. Barnard and the respondents Jackson County, Missouri, and seven individual present and former county legislators, Ed Growney, James Tindall, Mary Lou Smith, Robert Hertzog, Carol Coe, Fred Arbanas and Dennis Waits.

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PETITION FOR WRIT OF CERTIORARI

Petitioner James A. Barnard, who was terminated from his position as Jackson County Legislative Auditor in retaliation for exercising his First Amendment rights in speaking to the press and the FBI, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on January 11, 1995.

OPINIONS BELOW

The Eighth Circuit's opinion has been reported at 43 F.3d 1218. It is reprinted in the appendix, pp. 1a-20a, *infra*. Its decision to deny rehearing and rehearing en banc is reprinted in the appendix, p. 32a, *infra*. The Modified Memorandum and Order of the U.S. District Court for the Western District of Missouri (Sachs, J.), granting summary judgment to the respondents, is reported at 832 F.Supp. 1338. It is reprinted in the appendix, pp. 21a-31a, *infra*.

JURISDICTION

The Eighth Circuit issued its decision on January 11, 1995, affirming the district court's summary judgment in part and reversing in part. The Eighth Circuit denied a timely petition for rehearing on February 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

James A. Barnard brought this case to recover damages under 42 U.S.C. §1983, claiming that he had been discharged from his governmental employment in retaliation for exercising his First Amendment rights of free speech and association, and demanding a jury trial. The respondents have admitted in sworn statements and testimony that Barnard's contacts with the press in June 1990 were a motivating factor in his discharge.

Jackson County is a Missouri Constitutional Home Rule Charter County. Governmental functions are divided among the County Legislature, the County Executive, and various county departments and officials. The County Legislature consists of nine legislators headed by a chairman. There are several standing committees and occasionally some special committees. The Legislative Auditor is a charter officer who is placed under the authority of the Legislature, which in turn has delegated oversight of his duties to the Finance and Audit Committee.

Barnard was appointed as Legislative Auditor in October 1985. He served in that post until the seven individual defendants voted to discharge him on August 13, 1990. Article VIII §4 of the county charter provides that the auditor may be removed by a vote of two-thirds of the legislature and directs that the auditor "shall render to the legislature and the executive annual reports and such other reports as he shall deem advisable, or shall be required by ordinance."

Barnard performed or oversaw audits, investigations and reports pertaining to county departments and offices, contractual matters, other governmental or publicly-funded bodies, and the feasibility of possible levy increases. These were performance audits rather than financial audits. The scope of some audits included the occurrence of misbehavior, misfeasance, malfeasance, corruption, violation of public trust, theft, misuse or waste of funds, inappropriate use of funds, achievement of legislative funding purposes, and expenditures or other activities in compliance with law. Some of the audits were

critical of operations of the target entities, including management of funds, staffing levels, certain individual employees or officials, management practices, compliance with state statutes and county ordinances, and the need for continued existence or funding of such entity.

The audits were invariably the subject of newspaper articles after their release, and sometimes before. At times the Kansas City *Star* and other area newspapers published editorials responding to the audits. Sometimes the initiation of an audit or the events giving rise to a county resolution authorizing an audit were also reported in the press.

In October and November 1989, the Jackson County Medical Examiner complained that the assistant medical examiner was violating county conflict of interest laws. That allegation was made public and became the subject of some newspaper accounts. For example, an article appeared in the October 28, 1989, edition of the Kansas City *Star*, under the headline "Second paycheck to doctor raising questions in county," reporting the allegations that the assistant medical examiner "receives a second paycheck for outside work performed while he is supposed to be working in the examiner's office." The article also noted that the second paycheck was the result of a decision by the Jackson County Executive "to give money to [the assistant medical examiner] that formerly went to Jackson County." It suggested that the assistant was, in effect, given a raise when the County Executive terminated an agreement between the county and a non-profit organization which had previously paid the county directly to obtain the assistant medical examiner's services as a part-time pathologist. When the agreement was

terminated, the article reported, the county no longer received the $20,000 fee and the assistant medical examiner was allowed to contract with the non-profit organization independently, which he did, and obtain a higher fee under a new contract. The Medical Examiner alleged that the money once paid to the county was being paid directly to the assistant. She was quoted as saying, "It is a diversion of county funds to an individual, secretly as far as I can tell." The article also reported that other county employees had not received a pay raise since 1988. The assistant medical examiner declined to comment. One legislator (respondent Carol Coe) stated the legislative auditor would be asked to conduct an investigation and submit an audit.

The next morning (October 29, 1989), a Kansas City *Times* article by the same reporter contained much of the same information but also quoted the Legislative Chairman at the time (respondent Fred Arbanas) as saying, "What bothered me is we didn't know about the supplemental contract . . . We'd like to know when this happened, who made the contract and why it wasn't presented to the Legislature."

Three weeks later, in a letter dated November 21, 1989, the Medical Examiner accused her assistant of violating county personnel rules regulating conflicts of interest. About that time she also met with the chairman of the Finance and Audit Committee to discuss her complaints. On December 1, 1989, that Committee directed Barnard to conduct an audit of the assistant medical examiner's contractual relationships with the county, the allocation of his time and payment therefor, and possible conflicts of interest.

The issue of the assistant medical examiner's contractual arrangements and his supervisor's complaint that he was being paid from two sources for the same work surfaced again in February 1990. While Barnard was conducting his investigation into these matters, the nonprofit organization which paid the assistant medical examiner for part-time pathology work refused to cooperate or to turn over documents Barnard had requested. That was reported in the Kansas City *Times* on February 12, 1990. According to the article, two members of the Finance and Audit Committee (respondents Ed Growney and Mary Lou Smith) sided with Barnard in his attempt to obtain the information.

On March 2, 1990, the Legislative Chairman at the time (respondent James Tindall) asked that the scope of the audit of the Medical Examiner's Office include a comparison of its funding level with that of other jurisdictions and the possibility of a cooperative, multi-jurisdictional office to reduce expenses.

On April 27, 1990, while his investigation was still ongoing, a document signed by the members of the Finance and Audit Committee in secret, without public discussion or public vote, was given to Barnard (*see* p. 5a n.3). Entitled "Communication Guidelines Pertaining to Legislative Auditor," it states in part:

> Any audit performed by the Auditor's office shall be considered confidential in nature and will be treated in such a manner.
>
> . . .
>
> No employee of the Legislative Auditor's staff shall contact any person outside that office in

> regard to any investigation performed by that office other than those persons involved in the investigation.
>
> In the event that a contact inquiry is made with any employee of the Auditor's office, employees shall refrain from answering and the inquiries should be referred to the members of the Finance committee. The committee members should be notified immediately with the substance of the contact detailed on a Legislative Auditor Contact Record.

Barnard told his legislator supervisor he had no problem with the document.—

Barnard's audit of the Jackson County Medical Examiner's Office was formally presented to the Finance and Audit Committee on June 29, 1990, and covered two subjects. First, the audit was critical of the Jackson County Executive, who was in a hotly contested primary race in his bid for re-election (which he lost), and of the County Counselor, who was selected for the position by the County Executive. The audit confirmed the allegations reported in the preceding months. It stated that the County Executive and the County Counselor had clandestinely canceled the employment contract between Jackson County and the assistant medical examiner to the county's financial disadvantage, and that the assistant medical examiner was violating county conflict of interest prohibitions. It recommended further investigation by the legislature. All of the disclosures in the audit on this subject had already received newspaper coverage since late October 1989, as described above. Second, the audit addressed the feasibility of a multi-jurisdictional medical examiner's office as a cost-saving measure. The audit did

not refer to, and was not critical of, any individual legislator, staff member, or other employee of the County Legislature.

In late June 1990, before the Medical Examiner's Office audit was formally presented to the Finance and Audit Committee, Barnard spoke in private, away from his place of employment, with three members of the Kansas City *Star* editorial board about the upcoming audit. His discussion with the *Star* editors dealt with the two main subjects of the audit and involved information which was not stolen or pilfered, but which came to him in the ordinary course of his duties. Barnard testified in deposition that his purpose in discussing the audit was to make certain the editorial writers understood what the audit was about and to enlist their support so as to encourage the legislature to adopt the recommendations in the audit. His remarks to the editorial writers were never publicly reported or disclosed, either before or after the finished audit was presented to the Finance and Audit Committee. At about the same time, either the Legislative Chairman (respondent Tindall) or the Finance and Audit Committee chairman (respondent Growney), or both, asked for and received from Barnard a draft copy of the audit.

Barnard was discharged on August 13, 1990, approximately one month after the legislators learned he had spoken with the press about the Medical Examiner's Office audit before its formal release. During discovery, the legislators gave multiple and varying reasons for their discharge vote, but all admitted that his contact with the *Star*'s editors (or his refusal to comply with the "Communication Guidelines") was a motivating factor.

There is no evidence in the record that any legislator was contacted by the press or the public about information contained in the audit of the Jackson County Medical Examiner's Office before or after its formal presentment to the legislature on June 29, 1990.

The district court granted summary judgment in favor of the county and the legislators, holding that as a matter of law Barnard's discussion with the *Star* editors did not touch upon matters of public concern (pp. 26a, 30a).[1] The Eighth Circuit affirmed the summary judgment on different grounds after making factual findings.

Barnard also asserts that his contact with the FBI over allegations that one of the individual legislators may have violated state bribery laws was a motivating factor in his discharge. The district court granted summary judgment in favor of the respondents on this point, holding that there was insufficient evidence of causation as a matter of law because fewer than the necessary two-thirds of the legislators (i.e., six of nine) appeared to have been motivated by the FBI contacts (p. 25a). The Eighth

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[1] The district court's ruling was based in part on its mistaken belief that the audit was ignored by the news media. In fact, the record contains copies of six newspaper accounts of the audit and underlying disputes between October 28, 1989 and August 14, 1990. The court apparently misunderstood the audit as well as the content of Barnard's discussion with the *Star* about that audit. Speech involving the operation of government, official malfeasance and abuse of office is of inherent public concern and is entitled to *per se* protection. *O'Connor v. Steeves*, 994 F.2d 905, 913-4, 915 (1st Cir.), *cert. denied sub nom., Town of Nahant, Mass. v. O'Connor*, 114 S.Ct. 634 (1993); *Koch v. City of Hutchinson*, 847 F.2d 1436, 1466 n.17 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988).

Circuit reversed, holding that causation could be established if only two or three of the seven legislators were so motivated, and that the animosity shown by the legislators at a closed personnel meeting on May 7, 1990, was not dissipated as a matter of law by the time of the August 13 discharge vote. It remanded this aspect for trial (pp. 18a-19a). Review of the ruling on Barnard's FBI contacts is not sought by this Petition.

Unlike the district court, the Eighth Circuit assumed without deciding that Barnard's discussion with the *Star* editorial writers touched upon matters of public concern (p. 9a). Proceeding to the next step in the legal analysis, it concluded, in the face of conflicting testimony and evidence, that the respondents "have satisfied their burden to show that their interest in the efficient functioning of the legislature outweighs Barnard's personal interest in disseminating audit and investigation results to the press prior to providing it to his employer, the legislature." (p. 12a). In arriving at this conclusion, the Eighth Circuit made four findings of material fact favorable to the legislators which were genuinely disputed by Barnard:

(1) that Barnard frequently or routinely "leaked" information to the press concerning his audits (p. 4a);

(2) that the legislators' official tasks were disrupted, and that Barnard's frequent "leaks" to the press caused this disruption (pp. 10a-11a); and

(3) that Barnard's position involved a close working relationship with the county legislators (p. 11a).

Petitioner challenges these rulings of the court of appeals because (1) the opinion conflicts with decisions

from the Seventh Circuit holding that the employer's interests in confidentiality and discipline diminish where the information has already been reported in newspapers and placed in the public eye, (2) the court of appeals is forbidden to engage in fact finding, and (3) its decision deprives him of his Seventh Amendment right to jury trial on disputed questions of material fact.

REASONS FOR GRANTING THE WRIT

I. **The court of appeals' opinion conflicts with Seventh Circuit decisions holding that an employee may not be discharged for speaking out on matters which have already been publicly reported in newspapers, and that the employee's First Amendment interest in free speech and the public interest in the subject matter of the speech outweigh the employer's interest in confidentiality and discipline.**

II. **The court of appeals deprived Petitioner of his constitutional right to jury trial and violated the prohibition in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), by finding facts essential to its holding that Petitioner's interests in free speech on matters of public concern were outweighed by respondents' interests as employers.**

ARGUMENT

At the heart of this case lie two questions: whether a public employee may be discharged for speaking out on matters of public concern which have been publicly

reported in the newspapers and cannot be deemed confidential, and whether the courts of appeal may engage in fact finding in order to resolve a question of law, despite the Seventh Amendment's guarantee of trial by jury in suits at law and the decisions of the Supreme Court which prohibit fact finding at that level.

I. THE COURT OF APPEALS' OPINION CONFLICTS WITH SEVENTH CIRCUIT DECISIONS HOLDING THAT AN EMPLOYEE MAY NOT BE DISCHARGED FOR SPEAKING OUT ON MATTERS WHICH HAVE ALREADY BEEN PUBLICLY REPORTED IN NEWSPAPERS, AND THAT THE EMPLOYEE'S FIRST AMENDMENT INTEREST IN FREE SPEECH AND THE PUBLIC INTEREST IN THE SUBJECT MATTER OF THE SPEECH OUTWEIGH THE EMPLOYER'S INTEREST IN CONFIDENTIALITY AND DISCIPLINE.

Respondents must establish that Barnard's discharge is justified on "legitimate grounds." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Connick v. Myers*, 461 U.S. 138, 150 (1983). They have asserted that he was terminated for insubordination – failing to abide by the "Communication Guidelines" and disclosing to the press information contained in the audit of the Jackson County Medical Examiner's Office before it was formally presented to the legislature on June 29, 1990. They made no claim that his discussion with the Kansas City *Star* editors resulted in inquiries from the press or the public about matters contained in the audit; they did not assert that his discussion directly caused any disruption in the operation of county government or interfered with their duties.

The Eighth Circuit concluded that "Barnard had leaked the results of the audit to the *Star* prior to providing such information to the legislature" (p. 6a). Then, in conducting the balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court ruled that Barnard's interest in speaking to the press "is substantially outweighed by the Jackson County legislature's right to demand that its employees follow its procedures and its need to possess the information contained in the audits before being contacted by the press or constituents about them" (p. 12a).

When Barnard spoke with the editorial writers for the Kansas City *Star* in June 1990 privately about the soon-to-be-released audit of the Jackson County Medical Examiner's Office, he was not "leaking" or divulging new or confidential information. Contemporaneous newspaper accounts establish that the issues surrounding the assistant medical examiner's new contractual arrangements – the clandestine cancellation of the prior contract by the County Executive and County Counselor, the loss of $20,000 income to the county, and whether the new arrangement violated conflict of interest prohibitions – had already been made public eight months earlier. Barnard disclosed no secret information, compromised no secret investigation, and "leaked" no new facts.

Under these circumstances, the governmental interests in maintaining the confidentiality of the unreleased audit and maintaining discipline among its employees were outweighed by Barnard's right to speak out on matters of inherent public concern and the public's right to be informed. The court of appeals decision here conflicts with Seventh Circuit decisions in two similar situations.

A local government's attempt to impose a restriction on the right of police officers to expose official wrongdoing under a "confidentiality" rule was condemned in *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), as a violation of the First Amendment. The day after a newspaper reported that the officers were under investigation for a possible violation of restrictions against political activities (an investigation which was supposed to be confidential), those officers distributed a letter to city and state officials which confirmed that they had been questioned in connection with their political activities and asked the officials for protection. The police chief then began a separate investigation and brought disciplinary charges against the officers for breaching the confidentiality of the original internal affairs investigation.

The Seventh Circuit ruled that the officers' public disclosure of the original investigation was a matter of public concern and that disciplining them for breaching the confidentiality rule was constitutionally impermissible. After holding the confidentiality rule constitutional on its face, the court found its application under the circumstances violated the police officers' First Amendment rights because the subject matter of the officers' letter was already in the public eye. Noting that the defendants had the burden of showing "a state interest in confidentiality applicable on these facts which outweighs the public and individual interests in the particular statements made," *id.* at 754, it stated:

> [P]laintiffs were disciplined for distributing their September 17 letter concerning the police department's political activity investigation

> which they had been instructed to keep confidential. After publication of the September 16 newspaper article, however, the investigation was no longer a secret. In fact, the newspaper article included a statement by Chief Breier acknowledging that an investigation was in progress. * * * Plaintiffs' September 17 letter verified the factual details contained in the newspaper story. It also included charges that Chief Breier was conducting the internal investigation for improper purposes. Aside from these allegations, the letter disclosed no factual information not contained in the newspaper article published the day before.
>
> Under these circumstances, we do not believe that the state interests which support the police department's confidentiality rule justify its application in this case. By the time plaintiffs' letter appeared, the ability of the chief of police to conduct his internal investigation had already been destroyed by publication of a front-page newspaper article disclosing the existence of the investigation and the persons and subjects involved. *Id.*

The court also rejected the defendants' argument that the need for departmental discipline outweighed the First Amendment rights enjoyed by both the officers and the public under the circumstances:

> Of course departmental discipline may be undermined when police officers disobey an official regulation and an express order not to disclose police business. The department's general interest in discipline alone, however, does not outweigh the individual and public interest

> in the subject of plaintiffs' September 17 letter. * * * Once the matter was placed in the public eye, plaintiffs . . . had a legitimate interest in bringing any improper anti-union conduct by the chief of police in connection with the now-publicized investigation to the attention of influential government officials outside the police department. . . .
>
> The First Amendment protects not only the individual's interest in speaking out but also the public's interest in being informed. * * * . . . These government officials and the public at large were thus properly concerned with charges of misuse of police department internal discipline procedures to cripple the police officers' bargaining representative. *Id.* at 755-6.

The same result was reached in *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), in which the court refused to enforce a confidentiality rule where a police officer spoke to a judge, a prosecutor, the FBI and the press of his concern that the police chief had arranged for criminal charges to be dropped in two instances because of "political considerations." The circuit court noted that "[t]he subject matter of his communications, i.e., his perception of potential graft and corruption, is deserving of vigilant protection by the First Amendment. Furthermore, the public's interest in being informed of serious governmental misconduct is very great." *Id.* at 407.

In this case, the government's claimed interest in confidentiality wholly disappeared in October 1989 when the Medical Examiner's accusations that her assistant's contractual relationships violated conflict of interest laws

and worked to the county's financial detriment were reported in the newspaper and came to the attention of the public. The issues associated with his new contract remained in the public eye through subsequent newspaper stories and the conduct of other public business through governmental meetings and votes. Because these matters were already public when he spoke with members of the *Star*'s editorial board, the respondents' confidentiality rule served no purpose other than to prevent Barnard from speaking with the press about a matter of public concern until after the audit was formally presented and to limit public access to that information.

The Eighth Circuit improperly accorded substantial weight to the asserted governmental interests in confidentiality and discipline and entirely overlooked the public interest that allegations of official wrongdoing be brought to light. The court's balancing of competing interests has created a conflict among the circuits which this Court should resolve.

II. THE COURT OF APPEALS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO JURY TRIAL AND VIOLATED THE PROHIBITION IN *ICICLE SEAFOODS, INC. V. WORTHINGTON*, 475 U.S. 709 (1986), BY FINDING FACTS ESSENTIAL TO ITS HOLDING THAT PETITIONER'S INTERESTS IN FREE SPEECH ON MATTERS OF PUBLIC CONCERN WERE OUTWEIGHED BY RESPONDENTS' INTERESTS AS EMPLOYERS.

The question whether a public employee's speech is entitled to First Amendment protection is one of law.

Rankin v. McPherson, supra 483 U.S. at 386 n. 9. When there are underlying factual disputes which must be determined before the court may resolve the legal question, those are to be submitted to a jury at the trial court level in keeping with the employee's constitutional right to trial by jury in cases at law. U.S. Constitution, Seventh Amendment. The right of trial by jury as to all fact issues in civil cases at law has been jealously safeguarded in a legion of Supreme Court cases from the earliest era of the Court. *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077, 2085 (1991) ("In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury").

This Court has repeatedly forbidden every kind of fact finding by the circuit courts of appeal. The prohibition is unequivocal and extends to the determination of underlying factual disputes necessary to enable the court to decide questions of law. *Icicle Seafoods, Inc. v. Worthington, supra* 475 U.S. at 714 ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. . . . But it should not simply have made factual findings on its own."). That prohibition is all the more compelling when the circuit court is reviewing a summary judgment.

Despite these admonitions, the Eighth Circuit engaged in fact finding in order to affirm the district court's summary judgment on different grounds. The Eighth Circuit did not simply review factual findings of the district court because the district court resolved the

case on a question of law, not fact. The district court could not have found facts in any event.

The Eighth Circuit's findings related to the six factors noted in *Connick, supra* 461 U.S. at 151-4. It found that (1) Barnard prematurely disclosed confidential information to the press on frequent occasions (p. 4a); (2) legislative tasks were disrupted and that this disruption was caused by Barnard's prior "leaks" (pp. 10a, 11a); and (3) a close working relationship was required by Barnard's position (p. 11a). *See, e.g., Shands v. City of Kennett*, 993 F.2d 1337, 1342-3 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 880 (1994). The Eighth Circuit then ruled that, in light of these facts, the respondents' interest in promoting efficient public services outweighed Barnard's interest in free speech (p. 12a).

The Eighth Circuit should have reviewed the record and merely decided whether genuine issues of disputed fact exist on these material points (as Petitioner contends) or whether the factual development at the district court level was sufficient to resolve the legal questions inherent in the *Pickering* balance test. Instead, by deciding unresolved factual issues, the circuit court deprived Petitioner of his right to a jury trial.

CONCLUSION

The decision below incorrectly balanced the individual and public interests in speech on matters of inherent public concern against governmental interests in confidentiality and discipline which had long since disappeared after the subject matter of the speech was fully

reported in the newspapers. In so doing, the Eighth Circuit has created a conflict among the circuit courts of such overriding interest that this Court should resolve the question. Moreover, the handling of the case by the circuit court has deprived Petitioner of his Seventh Amendment right to jury trial.

For these reasons, Petitioner respectfully urges the Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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James A. BARNARD, Plaintiff-Appellant,

v.

JACKSON COUNTY, MISSOURI; Ed Growney, individually and in his official capacity as Jackson County legislator; James D. Tindall, individually and in his official capacity as Jackson County legislator; Mary Lou Smith, individually and in her official capacity as Jackson County legislator; Robert Hertzog, individually and in his official capacity as Jackson County legislator; Carol Coe, individually and in her official capacity as Jackson County legislator; Fred Arbanas, individually and in his official capacity as Jackson County legislator; Dennis Waits, individually and in his official capacity as Jackson County legislator, Defendants-Appellees.

No. 93-3758.

United States Court of Appeals,
Eighth Circuit.

Submitted May 9, 1994.

Decided Jan. 11, 1995.

Former legislative auditor sued county and seven individual legislators under § 1983 for retaliatory discharge in violation of his First Amendment rights. The United States District Court for the Western District of Missouri, Howard F. Sachs, J., 832 F.Supp. 1338, granted summary judgment for county and individual legislators. Former legislative auditor appealed. The Court of Appeals, Hansen, Circuit Judge, held that: (1) county and legislators satisfied their burden of showing that their interest in efficient functioning of legislature outweighed auditor's personal interest in disseminating audit and investigation results to press prior to providing it to

legislature, but (2) genuine issue of material fact regarding whether auditor's contacts with Federal Bureau of Investigation (FBI) was motivating factor in his termination precluded summary judgment.

Affirmed in part; reversed and remanded in part.

Steven L. Hobson, Kansas City, MO, argued (Ronald Stites, on the brief), for appellant.

J. Earlene Farr, Kansas City, MO, argued, for appellee Jackson County; Thomas F. Gordon, Kansas City, MO, argued, for appellees Hertzog, Smith and Arbanas (F. Russell Millin, on the brief).

Before LOKEN, Circuit Judge, BRIGHT, Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

James Barnard appeals from the district court's grant of summary judgment to Jackson County and seven individual legislators on his 42 U.S.C. § 1983 cause of action, which alleged retaliatory discharge in violation of his First Amendment rights. Barnard argues that the district court misapplied the applicable law in determining that no genuine factual issue exists. We affirm in part and reverse in part.

I. BACKGROUND

James Barnard worked as the legislative auditor for Jackson County, Missouri, from 1985 until his termination by the legislature in 1990. The legislative auditor is a charter officer who is appointed by the legislature and

serves at its pleasure. Barnard's responsibilities as auditor included performing or overseeing audits of various county departments and offices, conducting investigations of county entities, and such other tasks as the legislature directed him to do.[1] The Jackson County Home Rule Charter provides that the auditor may be removed by a two-thirds vote of the nine-member legislature.

In early 1987, Barnard was informed of allegations that Carol Coe, a legislator, had engaged in certain illegal activities. Barnard brought this information to the attention of the Jackson County legislature through a written memorandum and an oral presentation at a public meeting. The matter was eventually investigated by the Jackson County Prosecuting Attorney's office. Upon

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[1] Article VIII of the Jackson County Constitutional Home Rule Charter delineates the responsibilities of the Legislative Auditor as follows:

> Section 4. A continuing internal audit system shall be provided by the legislature. The legislature shall appoint a county auditor for a term of four years. He may be removed by a vote of two-thirds of the legislature. The auditor shall have the powers and duties prescribed by law and by ordinance. The auditor shall render to the legislature and the executive annual reports and such other reports as he shall deem advisable, or shall be required by ordinance.
>
> Section 5. An audit by independent certified public accountants shall be performed at the end of each fiscal year, and the legislature shall provide annually for the scope of such audit, provided, however, a complete audit of every office and department shall be performed not less frequently than every three years.

(Appellant's App. at 551-52.)

completion of the investigation, the prosecutor's office made a determination that there was insufficient evidence to institute criminal proceedings against Coe.

Undaunted, Barnard contacted the local Federal Bureau of Investigation (FBI) office and provided them with information concerning the Coe matter. Barnard continued to meet with the FBI on about a monthly basis for the next three years regarding other local matters, including allegations regarding local judges, politicians, and county and city government employees. Some of these meetings took place during the hours of Barnard's employment. No prosecutions resulted from Barnard's contacts with the FBI. Barnard discontinued his meetings with the FBI on May 7, 1990. By that date, all of the county legislators were aware that Barnard had been meeting with the FBI.

A Jackson County ordinance requires the auditor to release reports and conclusions from audits directly to the legislature.[2] In several instances, however, upon completing internal audits of county agencies and offices, Barnard informally discussed the results with members of the local press prior to furnishing his report to the legislature. Several legislators became aware of this practice and expressed concern because they were being subjected to

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[2] Specifically, Jackson County Code § 211.7 provides:

> *Release of Report* The Auditor shall release his reports directly to the County Legislature, the County Executive and the Clerk of the County Legislature who shall place the report on the agenda of the next meeting of the County Legislature under new business.

(Appellant's App. at 643.)

inquiries from the press and constituents concerning the audits before they had received and read them. Thus, on April 27, 1990, Barnard was instructed to defer discussions with third parties concerning audits and investigations until the legislators had been provided with a copy of the audit or investigation for personal review.[3] Once an audit was presented to the legislature, it became a matter of public record and any official, including Barnard,

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[3] Barnard was given a document entitled "Communication Guidelines Pertaining to Legislative Auditor." The document was signed by the three members of the Finance and Audit Committee of the legislature, who had direct oversight of Barnard's position. The document provides:

> Any audit performed by the Auditor's office shall be considered confidential in nature and will be treated in such a manner.
>
> All findings from audits shall be reported to the Finance and Audit committee in written form with [a] copy to the Legislative Chairman. The committee may desire to question the auditor or employees of that office regarding an audit report, in which case the question may be verbally answered.
>
> No employees of the Legislative Auditor's staff shall contact any person outside that office in regard to any investigation performed by that office other than those persons involved in the investigation.
>
> In the event that a contact inquiry is made with any employee of the Auditor's office, employees shall refrain from answering and the inquiries should be referred to the members of the Finance committee. The committee members should be notified immediately with the substance of the contact detailed on a Legislative Auditor Contact Record (see copy attached).

(Appellant's App. at 548.)

could discuss its results with third parties. Barnard admittedly agreed to comply with this directive.

In late 1989, allegations were made that an assistant county medical examiner was in violation of certain county conflict of interest rules. The legislature directed Barnard to conduct an audit of the county medical examiner's office. Barnard formally presented the results and conclusions of the audit to the Finance and Audit Committee of the legislature on June 29, 1990. However, Barnard had met with several members of the editorial board of the *Kansas City Star* prior to releasing the results of the audit to the legislature, despite the instructions he received on April 27 to refrain from such acts. His avowed purpose for this meeting was to garner the *Star*'s support for the results and conclusions he had reached in the medical examiner's audit. In July of 1990, the legislature became aware that Barnard had leaked the results of the audit to the *Star* prior to providing such information to the legislature. On August 13, 1990, the legislature voted 7-0 to discharge Barnard as auditor.[4]

Barnard subsequently filed the present 42 U.S.C. § 1983 action against Jackson County and the individual legislators who voted to terminate him, alleging that he was discharged in retaliation for exercising his First Amendment rights of free speech and association. Specifically, Barnard argued that his FBI contacts and discussions with the *Kansas City Star* concerning the medical

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[4] The legislators who were not present when the legislature voted on August 13, 1990, to terminate Barnard are not parties to the present action.

examiner's audit were protected First Amendment activities, his interest in exercising these rights outweighs Jackson County's interest in suppressing such speech, and his discharge thus runs afoul of the First Amendment. The district court granted summary judgment in favor of the County and the individual legislators. *Barnard v. Jackson County, Missouri, et al.*, 832 F.Supp. 1338 (W.D.Mo.1993). Barnard appeals.

II. DISCUSSION

Summary judgment is appropriate when the record as a whole shows that "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue exists for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). We review a district court's grant of summary judgment de novo. *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 607 (8th Cir.1992).

Barnard makes the following contentions about his discussion with the *Star* concerning the medical examiner's audit: (1) this private contact related to matters of public concern and is protected by the First Amendment; (2) the defendants did not establish that the County's interest in maintaining efficiency in the workplace outweighed his First Amendment interests; (3) this contact was a motivating factor in the decision to terminate his

employment; and (4) his First Amendment right to speak and associate with the members of the *Star* was so well established that the defense of qualified immunity is unavailable to the defendants. Barnard makes the following contentions about his meetings with the FBI: (1) these private meetings concerned possible criminal acts, were matters of "public concern" and outweighed the county government's interest as his employer in preventing this speech; and (2) whether these contacts were a motivating factor in his termination is a disputed issue of material fact. As a result of the above issues, Barnard contends, the district court erroneously granted the defendants summary judgment.

A. Barnard's Contacts with the Kansas City Star

It is well recognized "that a State may not discharge an employee on a basis that infringes [upon] that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)). Courts evaluating claims by public employees who allege discharge in derogation of their First Amendment rights must engage in a two-step inquiry. First, courts must determine whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir.1993) (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689), *cert. denied*, ___ U.S. ___, 114 S.Ct. 880, 127

L.Ed.2d 75 (1994). If so, the second inquiry involves balancing the employee's right to free speech against the interests of the state. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 802-03, (8th Cir.1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 325, 130 L.Ed.2d 285 (1994). Courts must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). These two questions are matters of law for the court to resolve. *Connick*, 461 U.S. at 148 n.7, 150 n.10, 103 S.Ct. at 1690 n.7, 1692 n.10. Because we believe that the second component of the above test resolved the issues regarding Barnard's contacts with the *Star*, we assume without deciding that Barnard's speech with the *Star* touched upon matters of public concern, and we proceed to the *Pickering* balancing test.

The *Pickering* balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. As an employer, a governmental body enjoys a legitimate interest in " 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.' " *Id.* at 150-51, 103 S.Ct. at 1692 (quoting *Ex parte Curtis*, 106 U.S. 371, 373, 1 S.Ct. 381, 383, 27 L.Ed. 232 (1882)) (alterations in original). The

governmental body bears the burden of establishing permissible grounds for an employee's discharge. *Id.* at 150, 103 S.Ct. at 1691.

Pertinent considerations in the application of the *Pickering* test are whether the employee's speech has a detrimental impact on working relationships where personal loyalty or confidence is necessary, and whether the speech impedes the efficient operation of the governmental entity's function. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899. Employee acts of insubordination may tip the balancing process in favor of the employer's interests in the efficient promotion of its services. *Connick*, 461 U.S. at 151-53, 103 S.Ct. at 1692-93. *See also Hubbard v. E.P.A.*, 949 F.2d 453, 459-60 (D.C.Cir.1991); *Jurgensen v. Fairfax County, VA.*, 745 F.2d 868, 883-84 (4th Cir.1984). The primary focus in applying the *Pickering* test is to determine whether the speech undermines "the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899.

In the present case, several legislators indicated that Barnard's penchant for disclosure of information to the press prior to its disclosure to the legislature had an adverse impact on their ability to efficiently carry out legislative tasks. Legislators could be and in some instances were contacted by the press and constituents concerning audits and investigations, the results of which the legislators were unaware. This prevented the legislators from communicating knowledgeably with the press and their constituents concerning matters which had been "leaked" and had the potential to erode citizen confidence in a competent and informed legislature. Barnard's

"leaks" forced the legislature to enact the "Communication Guidelines Pertaining to Legislative Auditor," which did not preclude Barnard from discussing audit results with the press but merely operated as a reasonable time restriction. As noted earlier, Jackson County Code § 211.7 requires that once an auditor's report is released to the legislature it must ("shall") be placed on the agenda of the next meeting as new business. Once that occurred, Barnard was free to garner all the public support for his conclusions he could and in whatever way he could muster. The legislature did not require that it be the first to know of the reports – only that the legislators not be the last to be informed by Barnard of the results of his investigations.

More importantly, several legislators viewed Barnard's refusal to adhere to the "Communication Guidelines," after his agreement to do so, as an act of insubordination and misconduct which undermined legislator confidence in him. The nature of Barnard's duties as legislative auditor required him to work in close harmony with members of the legislature and demands someone the legislature views as possessing integrity, loyalty, and a willingness to adhere to legislative requests. He was appointed by the legislature, served at its pleasure, and undertook tasks as it directed him to perform. He frequently dealt with sensitive issues of county government which the legislature justifiably viewed as confidential until they were fully investigated and reported upon. His interest in gaining support from the editors of the *Star* for the conclusions of the not-yet-

released medical examiner's audit in advance of informing his employer of the results is substantially outweighed by the Jackson County legislature's right to demand that its employees follow its procedures and its need to possess the information contained in the audits before being contacted by the press or constituents about them.

Further, Barnard's asserted First Amendment "right to leak" information that he has gathered as the legislature's investigator is dubious in the face of a dearth of case law reaching such a conclusion. The few reported cases that address this issue indicate that such a right is not tenable. *See Hubbard*, 949 F.2d at 459-60; *Jurgensen*, 745 F.2d at 883-84. As the able district judge observed, the absence of such case law indicates that public employees seldom argue that such a right exists. *Barnard*, 832 F.Supp. at 1341. For instance, few would dispute the President's authority to terminate a staff member who had a propensity to "leak" sensitive information to the press before the President was informed of it. In such instances, the integrity and proper functioning of the office mandate that information be made known to the office holder before it is disseminated to the public. The same holds true in this case for the office of the Jackson County legislative auditor.

The defendants have satisfied their burden to show that their interest in the efficient functioning of the legislature outweighs Barnard's personal interest in disseminating audit and investigation results to the press prior to providing it to his employer, the legislature. We hold that Barnard's termination as legislative auditor was not made in violation of his First Amendment rights as a

public employee with respect to his contacts with the *Kansas City Star.*

B. Barnard's Contacts with the FBI

Barnard alleges that his contacts with the FBI which spanned three years were protected First Amendment activity and played a substantial role in the legislature's decision to terminate him. In support of his argument, Barnard proffers several statements from legislators which he contends illustrate their disapproval with his meetings with the FBI and create a fact issue on causation, thereby precluding summary judgment. The district court held that Barnard's meetings with the FBI were "stale," i.e., too remote in time to have played a role in the legislature's decision to fire him. *Barnard,* 832 F.Supp. at 1340. Specifically, the district court ruled as a matter of law that "[i]nsufficient evidence of causation mandates a ruling for defendants on the FBI issue." *Id.* Before making its causation ruling and without citation to *Connick* or *Rankin,* the district court said that "[i]t seems rather well settled, however, that private communications in the nature of whistleblowing are entitled to First Amendment protection from governmental discipline or retaliation, and that any such retaliation against plaintiff for going to the FBI would violate plaintiff's federally protected employment rights." *Id.*

Barnard's FBI contacts must be subjected to *Connick's* two-part test to determine whether they are speech protected by the First Amendment. Again, this is a question of law for the court. *Connick,* 461 U.S. at 148 nn. 7 & 10, 103 S.Ct. at 1690 nn. 7 & 10. Speech disclosing allegations

of criminal activity allegedly committed by elected public officials and allegations of official misconduct by an incumbent elected official are matters occupying "the highest rung of hierarchy of First Amendment values." *O'Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir.) (quoting *Connick*, 461 U.S. at 145, 103 S.Ct. at 1689), *cert. denied sub. nom., Town of Nahant, Mass. v. O'Connor*, ___ U.S. ___, 114 S.Ct. 634, 126 L.Ed.2d 593 (1993). Such speech is of inherent public concern. *Id. See also O'Donnell v. Yanchulis*, 875 F.2d 1059, 1061 (3rd Cir.1989) ("[a]llegations of corrupt practices by government officials are of the utmost public concern"); *Gorman v. Robinson*, 977 F.2d 350, 356 (7th Cir.1992) (communications over a three year period to the FBI by housing authority purchasing agent concerning crimes by public housing employees are matter of "great concern to the public"); *Roth v. Veteran's Admin. of Gov't of U.S.*, 856 F.2d 1401, 1406 (9th Cir. 1988); *Brown v. Texas A & M Univ.*, 804 F.2d 327, 337-38 (5th Cir.1986). Accordingly, because Barnard's contacts with the FBI constitute speech on a matter of public concern, we proceed to discuss *Connick's* second requirement – the *Pickering* balancing test.

Information alleging abuse of public office by an elected public official "represents a public benefit entitled to great weight in the *Pickering* balance." *O'Connor*, 994 F.2d at 915. Considerations relevant to the legislators' interests are those we enumerated earlier which include but are not limited to "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or

interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899.

We also observe that Barnard's personal motives, if any there be, for divulging information to the FBI may be factored in the *Pickering* balancing test. *See O'Connor*, 994 F.2d at 915. "[I]nsofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matters of public concern intended to serve the public interest." *Id.* In the present case, the district court determined that Barnard "has apparently served as a self-appointed informant to the Federal Bureau of Investigation." *Barnard*, 832 F.Supp. at 1339.

Because the district court decided this case on Plaintiff's failure to demonstrate causation because of "staleness," a decision we hereinafter conclude to have been erroneous, it never performed the *Pickering* balancing test with respect to the FBI contacts. We believe the district court is best equipped to do so in the first instance, and hence we will remand for that purpose. Upon remand, the district court is free in conducting the *Pickering* test to determine whether Barnard's motives for speaking with the FBI were less than altruistic and therefore accord this expression less weight than speech purely intended to serve the public's interest.[5]

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[5] Given the above statement of the law, it may be argued that going to the FBI with evidence of alleged wrongdoing that has already been aired publicly and thoroughly investigated but not prosecuted by one sovereign, and thereafter agreeing to work as a self-appointed "mole" for the FBI for three years' time should be construed as an act of unacceptable disloyalty by a

If speech is determined to be protected under the *Connick* two-part test, then a plaintiff must show that the speech played a substantial role in his discharge "or, to put it in other words, that it was a motivating factor in the [discharge] decision." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) (quotations and footnote omitted). If the plaintiff makes that showing, then the burden shifts to the defendant to prove "that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287, 97 S.Ct. at 576. Ordinarily, the issue of whether protected speech played a substantial role in a public employee's termination is an issue of fact to be resolved by the jury. *Shands*, 993 F.2d at 1343; *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 675 (8th Cir.1986). However, the discharged employee does not in every case successfully resist a summary judgment motion merely by asserting that certain protected speech caused termination from public employment. At some point, the speech becomes so remote in time to the discharge that a court may rule as a matter of law that even if such speech enjoys First Amendment protection, it played no role in the employee's termination. *See O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1368 (7th Cir.1993) ("the mere fact

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trusted employee rather than the valid exercise of a First Amendment right and consequently entitled to little weight under the *Pickering* balancing formula. However, we leave to the district court to determine whether Barnard's contacts with the FBI were motivated by self-interest, such as vengeance against Legislator Coe and others, or whether Barnard sought to further the public interest by providing his information to the FBI, along with the appropriate weight his speech is to receive under *Pickering*.

that protected speech precedes an employment decision does not create the inference that the speech motivated the employment decision").

The plaintiffs evidence would tend to show that in late April 1990, after learning that Barnard was talking to the FBI, the Chairman of the Legislature, the Reverend Mr. Tindall, asked Barnard for his resignation. When Barnard asked why the request was made, Chairman Tindall refused to state a reason. At an executive session of the legislature held on May 7, 1990, called to discuss Barnard's performance, Mr. Tindall led off the meeting by informing the other legislators that Barnard had gone to the FBI, that Tindall did not trust Barnard, that Tindall had asked Barnard for his resignation and that Barnard had refused to give it, and that Tindall wanted Barnard fired. Barnard has one witness who attended the May 7 meeting who will testify that Tindall said Barnard should be fired *because* he went to the FBI. Other legislators asked Barnard to tell them what he had told the FBI about them. Some of them expressed anger that Barnard had gone to the FBI without telling them first. Legislator Waits asked Barnard sometime prior to the May 7 meeting if Barnard was "wired" and what Barnard had told the FBI about him. Legislator Coe (about whom Barnard had specifically gone to the FBI in the first instance) reportedly said, "That's why they [the FBI] have so much information on me."

There is some evidence that a deal was struck at the May 7, 1990, meeting which included Barnard's agreement that he would not talk to the FBI again without first notifying the legislature and that he would continue to be employed until the new legislature took office at the

beginning of 1991 (after the 1990 elections) when a decision would be made about his continued employment.

Arrayed against this evidence is the evidence provided by the individual legislator defendants that their decisions to terminate Barnard, made some three months later on August 13, 1990, were not based upon his previous FBI contacts but upon a variety of other factors including his violation of the April 27, 1990, "Communication Guidelines" in going to the *Star* about the medical examiner's audit in late June of 1990, his general incompetence as an auditor, his taking of an allegedly unofficial vacation, and other assorted management and personal shortcomings.

We believe the district court erred when it held as a matter of law that the plaintiff failed to produce sufficient evidence of causation to raise a genuine issue of fact as to whether or not his contacts with the FBI, which continued up to May 7, 1990, were a motivating factor in his termination on August 13, 1990. It took six votes to terminate Barnard. Of the seven votes cast against him, three were cast by legislators who three months earlier were the most vocal critics of his informer's relationship with the FBI. According to one witness, all of the legislators who voted to terminate him would have heard Chairman Tindall declare that Barnard *should* be fired for going to the FBI. We do not believe that the three-month time span between the May 7 meeting and the August termination is long enough to make the FBI matter "stale" as a matter of law. The evidence of record, together with the reasonable inferences that can be drawn from it, creates a jury issue concerning whether or not Barnard's FBI contacts

were a motivating factor in any legislator's termination decision.

The district court also ruled that because there was no evidence that the two-thirds of the legislators necessary to terminate were adversely motivated by reason of the plaintiff's FBI contacts, there was no factual basis for a trier of fact to conclude that such hostility may have caused the plaintiff's termination. If the plaintiff's evidence and its reasonable inferences are credited by the fact finder, it could find that three of the seven legislators who voted for termination were motivated by an unconstitutional reason, and without those three votes, Barnard would not have been fired. In fact, even if only two of those three votes were improperly motivated, the motion to fire Barnard would not have received the necessary six votes to pass.[6]

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[6] We decline to address the defendants' qualified immunity argument because that was not a basis for the district court's ruling on the motions for summary judgment. We construe footnote 5 in the district judge's opinion as a gratuitous comment about the potential for a qualified immunity claim. Given our existing case law, *see Grantham v. Trickey*, 21 F.3d 289 (8th Cir.1994); *Bartlett v. Fisher*, 972 F.2d 911 (8th Cir.1992), we agree with the district court that several of the defendants may be entitled to assert a qualified immunity defense. We leave to the district court to determine the merits of any such claims, if and when made, on remand.

III. CONCLUSION

For the reasons enumerated above, we affirm the district court's grant of summary judgment on the plaintiff's claim that he was terminated because of his contacts with the *Kansas City Star,* and we reverse and remand for further proceedings on his claim concerning his contacts with the FBI.

James A. BARNARD, Plaintiff,

v.

JACKSON COUNTY, MISSOURI, et al., Defendants.

No. 90-0988-CV-W-6.

United States District Court, W.D. Missouri, W.D.

Oct. 12, 1993.

Former county legislative auditor brought action against members of legislature, alleging that his First Amendment rights were violated in connection with his removal. The District Court, Sachs, Senior District Judge, held that: (1) auditor failed to show that his removal by legislature was in retaliation for protected First Amendment speech in form of communications to Federal Bureau of Investigation (FBI) regarding law violations within county government; (2) there was no First Amendment violation in requiring that auditor not discuss audits with press until after audits were presented to legislature and made available to public; and (3) auditor failed to meet threshold obligation to show that what he had to say to press was matter of overriding public concern.

Judgment for defendants.

Steven L. Hobson, Ronald J. Stites, Stites, McIntosh & Knepper, Kansas City, MO, for James A. Barnard.

Jay D. Haden, Russell D. Jacobson, J. Earlene Farr, Margaret M. Korth, F. Russell Millin, Millin & Trader, Thomas F. Gordon, Gordon & Gordon, P.C., Kansas City, MO, for defendants.

MODIFIED MEMORANDUM AND ORDER

SACHS, Senior District Judge.

Plaintiff Barnard served as legislative auditor for the County Legislature of Jackson County, Missouri, from 1985 until his removal by the Legislature in August 1990. His removal was voted by the seven defendant members of the Legislature who were present; six votes out of nine were needed under the County Charter. Plaintiff sues the voting members of the Legislature and the County, alleging a violation of 42 U.S.C. § 1983, in that his First Amendment rights to communicate matters of public concern to the Federal Bureau of Investigation and the editorial board of the Kansas City Star were allegedly violated. It is claimed the removal was in retaliation for such communications.

After discovery, defendants move for summary judgment. In ruling the motion the court gives plaintiff the benefit of the doubt on all material disputed facts. Pertinent material facts that are not in dispute are set forth below and in the analytical portions of this opinion.

Plaintiff's theory of the case is that the contested discussions were with (1) the FBI concerning allegations that defendant Carol Coe (then a member of the Legislature) had solicited for a bribe while a legislator; and (2) members of the press about various audits of county departments, offices, officers and contractors before the audits were presented to the Legislature in final form. Only the timing of plaintiff's discussions with the press was in controversy when the termination occurred. Plaintiff's Memorandum in Opposition (Doc. 145), p. 9.

After audits are presented to the Legislature they are filed and made available to the public, including the news media. The 1990 audits discussed with the editorial board included one on the Jackson County Sports Authority, in January 1990, which suggested a possible conflict of interest or "the potential for a conflict of interest" by appointed members of the Authority. The Legislature had passed a resolution "expressing concern" over the plaintiff's suggestion. A second audit discussed with the editorial board in May or early June 1990 related to the Medical Examiner's Office. This audit was later presented to the Finance and Audit Committee of the Legislature, chaired by defendant Growney, on June 29, 1990, and thereafter made public. Neither party characterizes the specific content of that audit in briefing to the court.

Between the two 1990 audits that were a subject of legislative concern, the Legislature met in executive session with plaintiff on May 7, 1990, to discuss his job performance. On April 27, 1990, plaintiff had been presented with "Communication Guidelines Pertaining to Legislative Auditor," prepared by defendant Growney and the County Counselor. Plaintiff said he had no problem with the guidelines. He now contends the guidelines given him were unduly restrictive, under State law and the First Amendment. He correctly contends they would prevent him from having any contacts with the press about his investigations and audits before they were presented to the Legislature in final form.

Plaintiff contends that at the May 7, 1990, job performance review some members of the County Legislature

appeared to be angry about his FBI contacts, which continued until that meeting. The questions about defendant Coe were publicly aired in 1987, but she apparently had no confirmation of plaintiff's role with the FBI until 1990.

Further factual review will be reserved for discussion of the two subjects of First Amendment controversy.

Communications to the FBI

Plaintiff has apparently served as a self-appointed informant to the Federal Bureau of Investigation regarding what he believes to be law violations within the County Government. He contends that he has proof that at least three members of the County Legislature voted to terminate his services, at least in part, because they resented his whistle-blowing activity. Defendants Tindall, Coe and Waits have been identified as critics of this practice.

Whether or not plaintiff's judgment about criminality was sound is not in issue; presumably the FBI and the United States Attorney would be capable of evaluating his information. It seems rather well settled, however, that private communications in the nature of whistle-blowing are entitled to First Amendment protection from governmental discipline or retaliation, and that any such retaliation against plaintiff for going to the FBI would violate plaintiff's federally protected employment rights. *Monsanto v. Quinn*, 674 F.2d 990, 994, 996 (3rd Cir.1982); *Brown v. Texas A & M University*, 804 F.2d 327, 337-8 (5th Cir.1986); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1404-8 (9th Cir.1988).

In reviewing an issue of this nature on a motion for summary judgment, lack of causation of injury may require judgment for a defendant. *O'Connor v. Chicago Transit Authority,* 985 F.2d 1362 (7th Cir.1993). No matter how hostile one or more members of the County Legislature may have been, as a result of plaintiff's informing the FBI, there is no evidence that two-thirds of the members of the County Legislature (or even a simple majority) were adversely motivated by reason of plaintiff's FBI contacts, and thus there is no factual basis for a trier to conclude that such hostility may have caused plaintiff's termination.[1]

Without weighing the evidence, it is noted, moreover, that the FBI issue centered on defendant Coe, according to plaintiff, the issue was so stale by 1990 that it could hardly have changed any votes, and some of the criticism of plaintiff that related to the FBI whistle-blowing was voiced by legislators like defendant Coe, who had been opposed to plaintiff's appointment in the first place. Insufficient evidence of causation mandates a ruling for defendants on the FBI issue.

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[1] Defendants Arbanas and Hertzog testified by deposition that they favored plaintiff's access to the FBI; defendants Growney and Smith cannot be identified as opponents of the practice.

Premature Discussions of Audits with Star Editorial Board

Whether the audit material discussed by plaintiff with the Star editorial board concerned matters of "public concern" is a somewhat elusive concept. The material relating to the Medical Examiner's Office has not been shown to be the sort of information on corruption, abuse of power, waste or mismanagement that cries out for public attention, and has been declared to be public interest material. *See Jurgensen v. Fairfax County, Va.*, 745 F.2d 868 872 (4th Cir.1984). It is more like an inspection report or typical internal governmental study, deemed by two of the *Jurgensen* judges to be lacking inherent public concern status. 745 F.2d at 890-1 (Ervin, J., concurring). The contrary views of the district judge and the dissenting judge in that case make it obvious that a ruling on what is of "public concern" is fraught with difficulty, particularly in a case like this, where an editorial board of a major newspaper gave plaintiff a hearing, despite the arguably routine nature of much of the work. *See also O'Connor v. Steeves*, 994 F.2d 905, 913 (1st Cir.1993), collecting cases showing "various approaches" to the inquiry about public-concern material.

I have concluded that it is easier to decide the case by assuming arguendo that there were matters of public concern in plaintiff's audit material. Even so, under Judge Russell's opinion for himself alone in *Jurgensen*, disciplinary action can be properly based on insubordinate release of the material. Restrictions on indiscriminate release of governmental information by employees, removal of records and the like, have occasionally been referred to as possibly justifying discipline. *Hubbard v.*

Environmental Protection Agency, 949 F.2d 453, 459-60 (D.C.Cir.1991); *Matlock v. Town of Harrah, Okl.*, 719 F.Supp. 1523, 1530 (W.D.Okl.1989). The insubordination factor relied on by Judge Russell has been a suggested consideration at least since *Connick v. Myers*, 461 U.S. 138, 153, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983). In many circumstances use of such procedural restrictions may be questionable or may be a pretext, but in the present case I find nothing questionable or pretextual in defendants' conduct.[2]

This case is unlike almost all litigated cases in that it is only the timing of news media contact that was challenged by defendants. Once the audit presented to the Legislature and became a matter of public record, defendants had no objection to plaintiff's defending or otherwise discussing the audit with the media. Defendant Growney, the most directly involved, testified that plaintiff "absolutely" had the right to discuss audits with the press after delivery to the Legislature; there is no basis to conclude and plaintiff does not contend that other defendants sought to impose a more restrictive policy. Plaintiff tacitly or expressly agreed not to engage in what defendants considered to be premature disclosure. He then violated the directive of the Finance and Audit Committee. The depositions make clear that Growney and others

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[2] There is no showing that the Star published articles or editorials about the audit that could have been a factor in terminating plaintiff, and it seems undisputed that the termination was based on criticism of plaintiff's procedures. It was not content-based. *Compare, Roberts v. Van Buren Public Schools*, 773 F.2d 949, 956-7 (8th Cir.1985); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 675 (8th Cir.1986).

considered this to be serious misconduct, probably fatal to an already difficult employment relationship.[3]

Plaintiff contends defendants could not adopt a "chain of command" policy, suppressing information that is a matter of public concern. *Czurlanis v. Albanese*, 721 F.2d 98, 105-6 (3rd Cir.1983). Unlike *Czurlanis*, however, this case does not require the court to consider whether plaintiff could have been permanently "muzzled," under an ironclad policy against leakage of information. Only a delay of several weeks, under the facts of this case, was contemplated.

While short-term prior restraints are highly questionable in some areas of First Amendment law there is no authority cited or found by the court which would generally prohibit some channeling of information to an employee's superiors prior to making a public release of information.[4] The absence of litigation suggests to me that few government employees would assert a constitutional "right to leak." Plaintiff asserts as justification for his conduct that he wished to get an early forum with the editorial board in order to foster understanding of the issues, from his standpoint. Plaintiff's legislative superiors, however, were entitled to assurance that they would not be faced with sudden surprises, making them the last to know about the contents of audits. Plaintiff's insistence on getting a head start with the news media

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[3] Other problems need not be detailed.

[4] A rule requiring clearance through a criticized superior would, of course, be unenforceable. *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 n. 5 (8th Cir.1979).

was rightfully treated as insubordinate, confrontational, and not entitled to First Amendment protection.

Plaintiff now contends that his conduct was legally sound as a matter of Missouri law, and that the Legislature was violating the law in trying to keep audit material confidential until formally presented. This need not be explored (as it was apparently not candidly discussed with the legislators before plaintiff violated the directive). Missouri law can sometimes be controlling in establishing liberty and property interests that must be honored as a matter of procedural due process. This First Amendment case, involving substantive due process, is not affected by a claimed violation of Missouri law. *Bagley v. Rogerson*, 5 F.3d 325 (8th Cir.1993); *Meis v. Gunter*, 906 F.2d 364, 369 (8th Cir.1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 682, 112 L.Ed.2d 673 (1991). It is sufficient to conclude that the county employee's freedom of speech, as guaranteed by the First and Fourteenth Amendments, has not been violated.

In the alternative, it is doubtful and probably unlikely that the material which may have had a part in triggering the discharge was so inherently a matter of public concern that an employee who has "leaked" the information to the press, contrary to his instructions, was entitled to constitutional protection. Plaintiff fails to meet his threshold obligation to satisfy the court that what he had to say was a matter of overriding public concern. Such a demonstration was his obligation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). From discovery material presented to the court, it can be gleaned that the most newsworthy issue dealt with in the audit of the Medical Examiner's

Office was plaintiff's criticism that the medical examiner was on two payrolls, that of the county and Hospital Hill Health Services Corp. The dual employment had been previously considered by county officials, and legality had been endorsed by the County Counselor. Under the circumstances the audit information apparently qualifies as being routine in nature, not unlike the *Jurgensen* material. The Star's failure to publish anything on the subject tends to confirm this conclusion.

Characterizing the material, which is said to be a judicial obligation, has its difficulties. In some contexts such as defamation it would be ridiculous to say that an audit of a public agency is not a matter of public interest. But the judicial test here used is whether the material is so insistently a question of public concern that its release by any employee, in breach of any pledge of confidentiality or instruction that may have been given, must be treated as constitutionally immune from discipline. A demanding standard must be used, to avoid the extraordinary conclusion that almost nothing learned by an employee in the Supreme Court building or the White House or at City Hall can be properly subject to valid confidentiality restrictions.

Even if the reasonableness of the limited restraint imposed in this case were not established, therefore, plaintiff would fail to make a submissible case if, as here, he should fail to demonstrate that the particular material involved was entitled to unrestricted public disclosure, as being inherently a matter of overriding public concern.

Judgment will be entered in favor of defendants.[5] SO ORDERED.

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[5] It may be noted that all individual defendants other than perhaps defendants Tindall, Coe and Waits would in any event be entitled to prevail on a qualified immunity defense. If their vote to terminate plaintiff was based in whole or in part on his violation of the restriction on premature release of audit information, and even if this could be ruled constitutionally invalid, no controlling precedent for such a novel ruling has been cited or found. At least four of the defendants were not violating a clearly established rule of constitutional law.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3758WMKC

James A. Barnard, Appellant, vs. Jackson County, Missouri, et al., Appellees.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 17, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit